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No. 314.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

FAIRMOUNT GLASS WORKS,

Petitioner,

v.

CUB FORK COAL COMPANY AND PARAGON COLLIERY COMPANY,

Respondents.

BRIEF FOR RESPONDENTS

O'CONNOR HALL,

Attorney for Respondents.

C. W. NICHOLS,

O. J. DEEGAN,

Of Counsel.

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ADDITIONAL STATEMENT

In addition to the facts set out in the petition and brief for the petitioner, Fairmount Glass Works, it is pertinent to call attention to the following:

The Circuit Court of Appeals in its opinion (Page 154) reached the conclusion that the undisputed evidence showed the respondents to be entitled to more than $18,000.00 after allowing to the petitioner all that it could possibly recover upon its counter-claim. In reaching this conclusion, the Circuit Court of Appeals computed the damages in both instances upon that basis most favorable to petitioner, that is, in computing the damages to which the undisputed evidence showed the respondents to be entitled the court took the difference between the contract price and the highest market price for each particular month, thus minimizing to the lowest limit set by any witness the damages recoverable by the respondents; and on the other hand when the Court came to compute the damages recoverable by the petitioner upon its counter-claim it took the difference between the contract price and the lowest market price, thus allowing the maximum to the petitioner according to the evidence of the witness that fixed the lowest market price. The Court reached the conclusion that accepting as true the contentions of the petitioner and reducing to the lowest limit fixed by any witness the claims of the respondents the latter were entitled to recover a substantial sum, and not the One Dollar fixed by the jury.

The only issue of fact which the petitioner now apparently claims should have been submitted to the jury was that of misrepresentation. This misrepresentation (Paragraph 4 Answer, pages 15 and 16; testimony of

John Rau, President of Petitioner Page 73) consisted in the claim that W. E. Deegans and I. F. Vass, at Huntington, West Virginia, on the 19th day of July, 1920, at the time the contract was entered into, stated that the Agent in whose name the contract was made, the W E. Deegans Coal Company, was the owner of the mines, whereas, in fact, they were owned by respondents. It was the claim of the respondents in the District Court, and in the Circuit Court of Appeals, that such statement was clearly shown by the documentary evidence furnished by the petitioner itself not to have been an inducing motive for the contract, for the reason that the petitioner had already determined to enter into the contract (the terms of which had been made known) before the 19th day of July, 1920, and before the agent of the petitioner ever went to Huntington, West Virginia. Exhibit 1, page 78; Exhibit 2, page 78; Exhibit 3, page 79; Exhibit G, page 65; Exhibit 7, page 81; Exhibit 8, page 65; Exhibit 8, page 82. The conclusion that the respondents would draw from this was that the District Court should have directed a verdict for the respondents.

The present litigation has lasted nine years and there have been three trials of the present case. 19 Fed. (2nd) 273; 33 Fed. (2nd) 420; 280 U. S. 601. (Record, page 43).

SUMMARY OF ARGUMENT

I

The petition for certiorari is based upon the proposition that the Court below re-examined facts found by a jury. The answer to this is, that the jury did not find but ignored, the facts in that, where the undisputed and un-

contradicted evidence showed large and substantial damages it returned nominal damages of only One Dollar, and the refusal of the District Court to set aside this verdict was not a decision upon a question of fact but of law and reviewable by the Circuit Court of Appeals.

II

The petitioner entirely lacks any substantial or meritorious defense to the action of the respondents, for as the record shows, and as the Circuit Court of Appeals found, petitioner breached the contract wholly without justification.

III

The granting of certiorari by this Court would only further delay the justice due respondents, now already delayed more than nine years by pleas and pretexts of petitioner found to be without substance or merit.

ARGUMENT

I

The entire position of the petitioner is and must be based upon the proposition that the jury had the right to ignore undisputed and uncontradicted evidence showing damages in excess of $18,000.00, without interest, and to return a verdict for only nominal damages of One Dollar. These damages were based upon matters easily calculable, that is the difference between the contract price and the markt price from month to month of a designated grade of coal. The Circuit Court of Appeals took the lowest measure of damages stated by any witness in calculating

the damages of respondents, and in calculating the damages upon the counter-claim of the petitioner took the highest measure of damages stated by any witness, and reached the conclusion that the respondents were upon any hypothesis entitled to recover more than $18,000.00, not counting intreest. The reversal of the order denying the motion to set aside this verdict was not a re-examination of facts, but a reversal upon a matter of law.

In **James** vs. **Evans,** 149 Fed. 136, 141, it is said that the ruling of the trial court upon the motion for a new trial if based upon an erroneous view of the law, amounts to an abuse of discretion and is reviewable.

In **Pugh** vs. **Bluff City Excursion Co.,** 177 Fed. 399, the Circuit Court of Appeals for the Sixth Circuit reviewed and reversed the refusal of the lower court to grant a new trial where the jury found for the plaintiff and fixed the damages of one dollar for the death of a son twenty-nine years of age and in good health.

In **Stetson** vs. **Stindt,** 279 Fed. 209, it is held by the Circuit of Appeals for the Third Circuit that a finding for the plaintiff, but for only part of the damages shown by uncontroverted evidence, is contrary to the law, and if the trial court refuses to set aside such a verdict its action is reviewable.

In **Glenwood Irrigation Co.,** vs. **Valery,** 248 Fed. 483, it is held by the Circuit Court of Appeals for the eighth circuit that a finding for the plaintiff, but for only part of the damages clearly recoverable, is an error of law, and in the action of the trial court thereon is reviewable.

In **Smith** vs. **United States,** 281 Fed. 696, the Circuit Court of Appeals for the fourth circuit reviewed and reversed the action of the trial court in refusing to grant a new trial.

In **Pugh** vs. **Bluff City Excursion Co.,** cited above, the Circuit Court of Appeals for the sixth circuit said:

"It is the general rule that the granting of a new trial is a matter of discretion, and will not be reviewed. But it is not so where the verdict is inconsistent on its face and shows the abuse of power on the part of the jury. If the granting of the motion is a positive duty, it is not discretionary. If it is necessary to correct a mistrial, it becomes a positive duty to set aside the erroneous proceeding and grant a new trial. And such, we think, was the case here. The jury found the plaintiff was entitled to recover. And if she was, it was absurd to say that she was entitled to only nominal damages. The conclusion seems unavoidable that the verdict was simply a compromise to prevent a disagreement. Its effect was to cut off the plaintiff from her privilege of having another trial if the jury were unable to agree upon the question of her right to recover. And upon the new trial to which she was entitled, she might be able to satisfy the jury that she was entitled to recover upon the merits of the action and have substantial damages."

In **Stetson** vs. **Stindt,** cited above, the Circuit Court of Appeals for the third circuit said:

"The third is based on the broad proposition of law that a verdict which is contrary to the law of the case or which is not sustained by evidence in the case must be set aside. On this general law some courts have squarely met the question and have held that an instruction on the measure of damages is an instruction on the law, that

a verdict by the jury in disregard of such instructions calls for a new trial, and that, under the circumstances, refusal by the trial court to grant a new trial constitutes reversible error.

"We are persuaded by the ratio decidendi of the last line of authorities that a verdict like the one under consideration, which is perverse and directly violative of the charge of the court and is wholly without evidence to support it, cannot stand. It is not sufficient to say that the defendant cannot complain because he was not injured. He was injured by being deprived of the right of a litigant to have the jury determine his liability under the law as laid down by the court. That liability might be for more than the jury found; yet it might be for nothing. What his liability is, the jury refused to say; but said something else, which, under the law and on the facts, was simply untrue. Therefore, we are of opinion that the verdict was invalid and that the court erred in entering judgment upon it. Whether this error is reversible depends on the next question.

"The defendants in error make the point that a question of error entering judgment on the verdict, even if invalid, is not before this court because that question was decided with finality by the trial court on the motion for a new trial, resting on the principle, too well established to require authority, that the granting or refusing of a new trial is a matter of discretion by the trial court, with the exercise of which an appellate court will not interfere.

"This rule, invariable in its operation, is by its terms applicable where the discretion of the trial court is invoked with reference to a matter open to its exercise. It was conceded in this case that the verdict was opposed to the court's instruction on the law. Also, there was no question whether the verdict was right or wrong. Admittedly, it was wrong. It did not require exercise of discretion to arrive at this conclusion. Everyone agreed to it. Therefore, the duty of the court not to

enter judgment upon a verdict unlawful because rendered in opposition to its instruction was one of law. **United States vs. Routt County Coal Co.,** 248 Fed. 483, 485. In the performance of that duty the learned trial judge was not called upon to determine a question with respect to which no strict rule of law is applicable, but he was called upon to enforce a fixed rule. His duty was quite imperative. Nor did the learned trial judge, in entering judgment on the verdict in this case, do so within a discretion which he brought into exercise. What he did was to interpret the law and thereupon to perform the duty of applying the law as he had interpreted it. As we have been constrained to find error in his interpretation of the law, it follows necessarily that error was involved in its application."

II

As found by the Circuit Court of Appeals (Record, Page 153), the petitioner committed a breach of its contract wholly without justification, and apparently it now claims that the only issue which should have been submitted to the jury was that of misrepresentation: that is, that it was represented that the agent, The W. E. Deegans Coal Company, was the owner o the mines when, in fact, the respondents were the owners (Pages 15, 16, 73). This representation was said to have been made at Huntington, West irginia, on the 19th day of July, 1920. A cursory examination of the record (Exhibit 1, page 78; Exhibit 2, page 78; Exhibit 3, page 79; Exhibit G, page 65; Exhibit 7, page 81; Exhibit 8, page 65; Exhibit 8, page 82) shows that such representation was never any inducing motive to the formation of the contract; for the petitioner had already determined to enter into the contract (the terms of which were known) before the President of petitioner ever came to Huntington. The pertinency of this matter here upon the present application is to show that the claim of the petitioner is wholly without merit, unsubstantial, and that its consistent course has

been to endeavor to avoid liability for its unjustifiable breach of contract in December, 1920.

III

Another matter not improper for the consideration of this court is, that the petitioner has succeeded in prolonging this litigation for nine years (Record, page 43). The present case has been tried three times; has been three times in the Circuit Court of Appeals, and a second application for a writ of certiorari is now made to this Court. As the record shows, and as the Circuit Court of Appeals found, there was no substantial defense to the claim of respondents. The grant of certiorari by this court would only further prolong a litigation which has now extended over a period of more than nine years.

It is, therefore, respectfully submitted that the writ of certiorari should be denied.

CONNOR HALL,
Attorney for Respondents.

C. W. NICHOLS
O. J. DEEGAN,
Of Counsel.

CUBI POINT COAL COMPANY and
PARAGON COLLIERY COMPANY
Respondents

BRIEF FOR RESPONDENTS

CONNOR HALL, Esq.
Counsel for Respondents

C W Nicholls